# In The
# Supreme Court Of The United States

## 78-1930

OCTOBER TERM, 1978

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THE THEODORE D. BROSS LINE CONSTRUCTION CORPORATION,
PETITIONER

vs.

LYLE WENDELL, SECRETARY OF REVENUE OF THE STATE OF SOUTH DAKOTA,
RESPONDENT

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# MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI AND PETITION FOR WRIT OF CERTIORARI

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# MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI

Petitioner, THE THEODORE D. BROSS LINE CONSTRUCTION CORPORATION, respectfully moves this Court for leave to file the Petition for Writ of Certiorari hereto annexed under Section 1651 of Title 28 of the United States Code, directed to the United States Court of Appeals for the Second Circuit, and particularly the Honorable Henry J. Friendly, the Honorable J. Joseph Smith and the Honorable Walter R. Mansfield, Circuit Judges of the United States Court of Appeals for the Second Circuit.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, THE THEODORE D. BROSS LINE CONSTRUCTION CORPORATION, respectfully petitions this Honorable Court for a Writ of Certiorari to review a judgment of the United States Court of Appeals for the Second Circuit rendered in this cause on March 8, 1979.

I. Opinions Delivered in Courts Below

Copies of the orders of the United States Court of Appeals for the Second Circuit and the motions and opinions in connection therewith which may be essential to an understanding of the matters set forth in this Petition, are appended hereto and marked as Exhibits A, B, C, D, E, F, G, H, I, J, K and L.



II. Jurisdictional Statement

The date of the judgment sought to be reviewed is March 8, 1979, and the time of its entry is March 8, 1979. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question is Section 1651(a) of Title 28 of the United States Code. The compelling circumstances which warrant immediate review by this Court of the order hereby involved are in this petition under "Reason Relied on for Allowance of Writ."

III. Questions Presented

The questions presented for review are:

(1) Did the United States District Court for the District of Connecticut in THE THEODORE D. BROSS LINE CONSTRUCTION CORPORATION vs. LYLE WENDELL, SECRETARY OF REVENUE OF THE STATE OF SOUTH DAKOTA, Civil Action File No. H-77-480, err in ruling that said Court lacked venue because the Petitioner's claim did not arise in the State of Connecticut, when the facts establish that: (1) the bid documents were received in Connecticut, (2) the bid was prepared in Connecticut, (3) the contract was signed in Connecticut, (4) all material and equipment were ordered from Connecticut, (5) the project manager was hired in Connecticut, (6) all employees were paid from Connecticut, (7) all corporate books and reports were kept in Connecticut and all of Petitioner's employees and executives who have knowledge of the subject matter of this litigation live and work in Connecticut?

(2) Did the United States District Court for the District of Connecticut in THE THEODORE D. BROSS LINE CONSTRUCTION CORPORATION vs. LYLE WENDELL, SECRETARY OF REVENUE IN THE STATE OF SOUTH DAKOTA, Civil Action File No. H-77-480, err in ordering said action transferred pursuant to 28 U.S.C. §1406(a) to the United States District Court for the District of South Dakota by abusing its discretion in ordering said transfer when said transferor District Court had proper venue?

(3) Did the United States Court of Appeals for the Second Circuit in IN RE THE THEODORE D. BROSS LINE CONSTRUCTION CORPORATION, Civil Action File No. H-79-3013, err in denying the Petition for Writ of Mandamus and Motion for Stay?

## IV. Statutes Involved

The statutes of the United States which are involved are 28 U.S.C. §1391(b) and (c), and 28 U.S.C. §1406(a).

28 U.S.C. §1391(b) provides as follows:

> "(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the Judicial District where all the Defendants reside, or in which the claim arose, except as otherwise provided by law." (emphasis added)

28 U.S.C. §1391(c) provides as follows:



> "(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business, or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

28 U.S.C. §1406(a) provides as follows:

> "(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

## V. Statement of Case

The basis for federal jurisdiction in the court of first instance is 28 U.S.C. §1331(a), as there are substantial federal questions involved in the underlying cause of action.

The Petitioner is a Connecticut corporation whose principal place of business is in Bloomfield, Connecticut. Petitioner was the successful bidder on a contract to build a utility line for the United States of America on federally-owned land in South Dakota and Iowa.

All of Petitioner's financial, fiscal and planning activities were conducted from Connecticut. When it formulated the bid for this contract, the bid was formulated in Connecticut. All payments

to subcontractors, suppliers and taxing authorities were made from Connecticut. All materials were ordered from Connecticut and paid for from Connecticut. Any profits the Petitioner makes and any losses it sustains, are profits made and losses sustained in Connecticut.

In the course of performing the contract, the Petitioner had occasion to use certain materials owned and supplied to it by the United States of America. The Petitioner also had occasion to order certain materials from outside the State of South Dakota which, on arrival in said State, but prior to passing into the possession of the Petitioner, were sold to the United States of America. Both kinds of material were later used by the Petitioner in its performance of its contract with the United States of America.

Lyle Wendell, Secretary of Revenue of the State of South Dakota, attempted to levy a use tax upon the Petitioner based upon the value of the materials used by the Petitioner but owned and supplied by the United States of America. A portion of said assessment was paid under protest by the Petitioner, from its home office in Connecticut. Subsequent to the protested payment, said Lyle Wendell informed the Petitioner that he intended to assess a further use tax.

The Petitioner brought an action in the District of Connecticut seeking an injunction against any further enforcement of the South Dakota use tax by said Lyle Wendell, and seeking a refund of the $67,389.93 in taxes paid under protest. Lyle Wendell filed a Motion to Dismiss



said action based upon challenges to personal jurisdiction and venue. The District Court, Clarie, J., sustained the challenge to venue and ordered the action transferred to the District of South Dakota. Said Court subsequently refused to amend its Order and refused to certify pursuant to 28 U.S.C. §1292(b) that the disputed issue of law was a matter affording serious grounds for a difference of opinion.

The Petitioner appealed to the United States Court of Appeals for the Second Circuit from both the Order to Transfer and the denial of the motion to amend the Order to incorporate the Section 1292(b) certification. Said appeal was dismissed for lack of jurisdiction.

The Petitioner sought a Writ of Mandamus and motion for a stay from the United States Court of Appeals for the Second Circuit to review the United States District Court for the District of Connecticut's determination that said Court lacked venue and for its transfer of said action to the United States District Court for the District of South Dakota. Said Petition for a Writ of Mandamus was denied on March 8, 1979.

## VI. Reasons Relied on for Allowance of Writ

This is an appropriate case for this Court to exercise its power to issue all necessary writs under 28 U.S.C. §1651 for the following reasons:

A. VENUE WAS PROPERLY PLACED IN THE JUDICIAL DISTRICT OF CONNECTICUT BASED ON THE JUDICIAL DISTRICT IN WHICH THE CLAIM AROSE.

28 U.S.C. Section 1391(b) provides for venue in a Civil Action in the Judicial District ... "in which the claim arose."

Attached hereto as "Exhibit M" is a copy of the Affidavit of Mr. Eugene D. Bross, Executive Vice-President of the Petitioner, THE THEODORE D. BROSS LINE CONSTRUCTION CORPORATION, dated February 9, 1978.

This Affidavit clearly points out that the Judicial District of Connecticut is the District wherein "the claim arose."

(1) The bid documents for the construction contract in question were received in Connecticut.

(2) The bid was fully prepared and fully estimated by the Petitioner's employees, solely in Connecticut.

(3) The actual construction contract, after receipt of the successful bid, was signed by the Petitioner, in Connecticut.

(4) All materials and all equipment needed for the construction contract were ordered solely from Connecticut.



(5) All materials that are the subject of the State of South Dakota's Use Tax Claim, were ordered solely from Connecticut (with the sole exception of the materials supplied by the United States Government).

(a) All orders for these materials were confirmed by purchase order issued from Connecticut.

(b) All directions for the initial delivery of these materials were issued from Connecticut.

(c) All invoices for payment of these materials were received solely from Connecticut.

(d) All payments for these materials were made solely from Connecticut.

(6) The project manager on the subject construction job was hired in Connecticut.

(7) All books and records concerning employees and actual labor performed on the construction job were maintained in Connecticut.

(8) All labor on the subject construction job was paid solely from Connecticut.

(9) All materials and equipment needed and utilized on the subject job were sent from Connecticut or ordered solely from Connecticut.

(10) All orders for the general supervision of the subject construction job were issued from Connecticut.

(11) All corporate books, records, and reports concerning the subject construction job were kept solely in Connecticut, and remain in Connecticut.

(12) All of the Petitioner's employees and executives who have knowledge of the subject matter of this litigation, live in Connecticut and work in Connecticut. The Petitioner has only two full-time employees in South Dakota.

(13) All of Petitioner's witnesses as to the facts of this case, and all books, records, reports, invoices, cancelled checks and other documents, are located solely in Connecticut.

(14) The payment of $67,389.93 made by the Petitioner to LYLE WENDELL, Secretary of Revenue of the State of South Dakota, under protest on account of the South Dakota Use Tax, was made from Connecticut.

(15) All materials and supplies for which the State of South Dakota is claiming Use Tax were ordered and purchased from, invoiced to and paid solely from Connecticut.

On the facts, it is clear that the claim which is the subject matter of this litigation, arose in the Judicial District of Connecticut.

The Situs of the taxing injury or the potential taxing injury does not,



however, in and of itself determine the proper venue of this case. In Philadelphia Housing Authority v. American Radiator and Standard Sanitary Corporation, 291 F. Supp. 252, 260 (1968), the U.S. District Court held that to adopt a "mechanical test" of "place of injury" to determine "where the claim arose" may be valid in a tort suit involving personal injuries or wrongful death, but would be overly "simplistic" in other cases.

The case of Weil v. New York State Department of Transportation, 400 F. Supp. 1364 (1975) concerned an action brought by a state civil servant to contest a lay-off. The U.S. District Court, using the "weight of the contacts" test, held that venue should be placed in the district in which the decision to lay off the plaintiff was made, rather than in the district in which the decision was implemented.

The Petitioner's action presents an analogous situation. The facts clearly show that the weight of the contacts in the preparation, execution and performance of the BROSS-UNITED STATES contract have been almost exclusively in the District of Connecticut. All of the materials sought to be taxed by the Defendant were ordered, invoiced and paid for in Connecticut. Directions for shipment in interstate commerce were issued from Connecticut. Therefore, within the meaning of 28 U.S.C. 1391(b), venue is properly placed in the District of Connecticut where the contract and the claim arose.

B. VENUE WAS PROPERLY PLACED IN THE DISTRICT OF CONNECTICUT BASED ON CONSIDERATIONS OF INCONVENIENCE AND DISADVANTAGE TO A PARTY.

In the event that this Court should find that the balance of the weight of the contacts in this action is shared between the District of Connecticut and an alternative district, venue is properly placed in the District of Connecticut nonetheless.

In Idaho Potato Commission v. Washington Potato Commission, 410 F. Supp. 171 (1975), the defendant had approved an advertising plan in the State of Washington. The plan, which was the basis for an alleged trademark infringement, was implemented in Idaho. The court held that the "weight of the contacts" was shared between Washington and Idaho. Venue could be properly placed in either district. Selection of either forum would be equally disadvantageous and inconvenient to the parties involved. The court allowed the action to be brought in the forum chosen by the Plaintiff.

In the instant action, the Petitioner BROSS would be greatly inconvenienced and would suffer severe hardship if its action were to be transferred out of the District of Connecticut (or dismissed entirely). BROSS' witnesses, key personnel, and business books and records are all located within the District of Connecticut. If this Court were to find that the balance of "the weight of the contacts" is shared between the Connecticut district and an



alternate forum, Idaho Potato Commission still requires that the Plaintiff's choice of forum should be respected, and that venue be placed in the District of Connecticut.

C. VENUE WAS PROPERLY PLACED IN THE DISTRICT OF CONNECTICUT WHICH IS THE RESIDENCE OF THE CORPORATE PLAINTIFF.

28 U.S.C. 1391(c) provides an additional justification for the placement of venue in the Judicial District of Connecticut. That Statute provides:

> "(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business, or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

A number of Courts have held that Section 1391(c) was intended to apply to corporate plaintiffs as well as corporate defendants.

This view is in keeping with Congressional intent to liberalize the venue status.

See 1 Moore's Fed Practice ¶70.142 (5-3) at 1500-1503:

> "Toilet Goods Association, Inc. v. Celebrezze, 235 F. Supp. 648 (S.D.N.Y. 1964); Wear-Ever Aluminum, Inc. v. Sipos, 184 F. Supp. 364 (S.D.N.Y. 1960);

Southern Paperboard Corporation v. United States, 127 F. Supp. 649 (S.D.N.Y. 1955); Freiday v. Cowdin, 83 F. Supp. 516 (S.D.N.Y. 1949), appeal dismissed by consent, 177 F.2d 1020 (2d Cir. 1949); Consolidated Sun Ray, Inc. v. Steel Insurance Co., 190 F. Supp. 171 (E.D. Pa. 1961); Travelers Insurance Co. v. Williams, 164 F. Supp. 566 (W.D.N.C. 1958) aff'd 265 F.2d 531 (4th Cir. 1959); Standard Insurance Co. v. Isbell, 143 F. Supp. 910 (E.D. Tex. 1956); Eastern Motor Express, Inc. v. Espenshade, 138 F. Supp. 426 (E.D. Pa. 1956); Hadden v. Barrow, Wade, Guthrie & Co., 105 F. Supp. 530 (N.D. Ohio 1952)."

Furthermore, unless Section 1391(c) is interpreted to apply to both corporate plaintiffs and defendants, the second clause is redundant and would, therefore, be read so as to define the residences of corporate plaintiffs differently from the residences of corporate defendants. It is an accepted rule of statutory construction that statutes must be read so as to be logically and internally consistent. So read, §1391(c) provides BROSS as a corporate plaintiff and resident of the District of Connecticut, an additional basis to properly establish venue for this action in the District of Connecticut.

Equity, fairness and good sense require that venue in this action be and remain in Connecticut.



## D. TRANSFER OF THE CAUSE OF ACTION TO SOUTH DAKOTA WAS IMPROPER AND AN ABUSE OF DISCRETION.

As previously noted, 28 U.S.C. §1406(a) provides as follows:

> "(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." (emphasis added)

Said statute requires that the transferor District Court lack venue and that the transferee District Court have proper venue. As demonstrated above, said transferor District Court had proper venue over the underlying cause of action, and hence the Honorable T. Emmet Clarie misapplied said statute by ordering the transfer. The transfer denied the United States District Court for the District of Connecticut of jurisdiction, when said court had proper venue and jurisdiction.

## E. A WRIT OF MANDAMUS IS THE APPROPRIATE PROCEDURE TO REVIEW AN INTERLOCUTORY ORDER DIRECTING A TRANSFER.

The United States Court of Appeals for the Second Circuit has stated that mandamus would lie to review an interlocutory order granting or denying a transfer. In Ford Motor Co. v. Ryan,

182 F.2d 329 (CA 2d, 1950), cert. den. 340 U.S. 851, Frank, Circuit Judge, Judge, held that mandamus would lie to review an order refusing to direct a transfer. The rationale for granting the writ of mandamus was stated as follows:

> "...Judge Hand and I think this is the kind of interlocutory order with which this court can properly deal by way of such a writ, since should petitioners--the defendants--finally lose on the merits below, any error in the interlocutory order would probably be incorrectible on appeal, for petitioners could hardly show that a different result would have been reached had the suit been transferred. Nor, should petitioners win on the merits below, could they collect as costs the additional expenses to them, if any, due to the court's failure to order the transfer. We recognize that the dividing line is by no means entirely clear between the power of this court and its lack of power to issue the writ. But we think this is a sufficiently 'extraordinary cause' to empower us to do so, if the district judge erred."
>
> Ford Motor Company v. Ryan, 182 F.2d 329, at 330.

The above rationale for granting a writ of mandamus for a transfer pursuant to 28 U.S.C. §1404(a) is equally applicable to the instant matter, involving



a transfer pursuant to 28 U.S.C. §1406(a). "...(A)ny error in the interlocutory order would probably be incorrectable on appeal,..." whether the transfer was ordered pursuant to 28 U.S.C. §1404(a) or §1406(a).

## VII. CONCLUSION

WHEREFORE, THE THEODORE D. BROSS LINE CONSTRUCTION CORPORATION, Petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the above-entitled case.

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## 78-1930

OCTOBER TERM, 1978

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THE THEODORE D. BROSS LINE CONSTRUCTION CORPORATION,
PETITIONER

vs.

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RESPONDENT

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## APPENDIX

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI AND PETITION FOR WRIT OF CERTIORARI

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EXHIBIT A

UNITED STATES DISTRICT COURT

FOR THE
DISTRICT OF CONNECTICUT

| | |
|---|---|
| THE THEODORE D. BROSS LINE CONSTRUCTION COMPANY<br><br>Plaintiff<br><br>v.<br><br>LYLE WENDELL, SECRETARY OF REVENUE OF THE STATE OF SOUTH DAKOTA<br><br>Defendant | CIVIL ACTION FILE NO.H77-480<br><br>SUMMONS |

To the above named Defendant:

You are hereby summoned and required to serve upon Mark C. Yellin, Esq. plaintiff's attorney, whose address is:
784 Farmington Avenue
West Hartford, Connecticut 06119
an answer to the complaint which is herewith served upon you within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

SYLVESTER A. MARKOWSKI
Clerk of Court.

EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

| | |
|---|---|
| THE THEODORE D. BROSS LINE CONSTRUCTION CORPORATION, Plaintiff | CIVIL ACTION FILE NO. H77-480 |
| v. | COMPLAINT |
| LYLE WENDELL, SECRETARY OF REVENUE OF THE STATE OF SOUTH DAKOTA, Defendant | |

1) The Plaintiff, THE THEODORE D. BROSS LINE CONSTRUCTION CORPORATION (hereinafter called, "BROSS") is a corporation, incorporated under the laws of the State of Connecticut, and has its principle place of business in the Town of Bloomfield, Connecticut.
2) The Defendant, LYLE WENDELL, is a citizen of the State of South Dakota, and is and was at all times hereinafter mentioned, SECRETARY of REVENUE of the STATE of SOUTH DAKOTA, (hereinafter called, "SECRETARY OF REVENUE").
3) The amount in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand ($10,000) Dollars.
4) The Federal District Court has jurisdiction over this action under 28 U.S.C. § 1331(a) as there are substantial federal questions involved in this action.
5) This action further arises under the



CONSTITUTION OF THE UNITED STATES, Article I, Section 8, (the "Commerce Clause"). Article VI, (the "Supremacy Clause"), and under the "due process" and "equal protection" clauses of the Fourteenth Amendment to the CONSTITUTION OF THE UNITED STATES.
6) Further, the Plaintiff claims its Constitutional rights have been deprived under the color of State law, and this Court has jurisdiction under 42 U.S.C. § 1983(3).
7) The Plaintiff also claims this Court has jurisdiction under 28 U.S.C. § 1343(3).
8) The Plaintiff prays for monetary damages, a declaratory judgment under 28 U.S.C. § 2201, and for injunctive relief. The Plaintiff respectfully requests that a three-judge court be convened as required by 28 U.S.C. § 2281.
9) On or about May 30, 1975, subsequent to a successful bid, BROSS entered into a contract with the UNITED STATES OF AMERICA (hereinafter called, the "UNITED STATES").
10) This contract with the UNITED STATES, on behalf of the Department of the Interior, Bureau of Reclamation, required BROSS to build for the UNITED STATES, a 345-Kilovolt electrical transmission line, 176.8 miles in length, connecting the Watertown Substation in the State of South Dakota, with the Sioux City Substation in the State of Iowa, on a right of way owned by the UNITED STATES.
11) The contract also required BROSS to build a section of 115-Kilovolt electrical transmission line about 14.4 miles in length, connecting the Watertown Substation in South Dakota, with Brookings, South Dakota,
12) The said electrical transmission lines

were a final link closing a four-state electrical power loop, transmitting electricity between the States of Nebraska, North Dakota, South Dakota, and Iowa.
13) This transmission line was part of the Pic-Sloan Missouri Basin Program, and the BROSS contract was for $19,400.00.
14) Pursuant to the terms of the aforesaid contract, the UNITED STATES supplied BROSS with certain tangible personal property for use by BROSS, in the construction of the aforesaid electrical transmission lines.
15) The contract also required BROSS to purchase other materials, inclusing electrical conductors, insulators, concrete, line hardware, and steel.
16) Except for the concrete, all of these necessary materials were not readily available for purchase either in the State of Iowa or in the State of South Dakota, and BROSS was required to purchase all of these materials outside of the States of South Dakota and Iowa.
17) Some of these materials were invoiced by BROSS to the UNITED STATES, and after payment to BROSS by the UNITED STATES, BROSS in turn paid the vendors, and then the materials were shipped into the States of South Dakota and Iowa.
18) These materials after purchase, were shipped in interstate commerce and delivered to five railroad unloading yards located at various points in the State of South Dakota, and to one railroad unloading yard, located in the State of Iowa.
19) The UNITED STATES at all times, acting under the terms of said contract, exercised final supervisory authority over all the



purchases of materials by BROSS.
20) The UNITED STATES further specifically specified all the materials to be purchased by BROSS, and specified the design criteria of all of these materials.
21) UNITED STATES Inspectors inspected certain of these materials at the out-of-state locations where they were manufactured, and after, again inspected all of the materials, at these railroad unloading yards located in South Dakota and Iowa.
22) The materials not previously paid for by the UNITED STATES to BROSS, were shipped to these various railroad unloading sites, and there, after an inspection by the UNITED STATES Inspectors, BROSS resold all of these materials to the UNITED STATES, and BROSS was paid in full for these materials by the UNITED STATES, while these materials lay in place at these various railroad unloading yards.
23) The said resale of these materials by BROSS to the UNITED STATES, transferred all ownership, right, title and interest in these materials, to the UNITED STATES.
24) After title and ownership had passed to the UNITED STATES, and as a separate and distinct part of its contract, BROSS transported these same UNITED STATES owned materials from the railroad unloading sites, to the actual 176.8 mile long construction job right of way, which right of way was located many miles away from these various railroad unloading sites.
25) Later as part of said contract, at the actual right of way, BROSS assembled the pieces of steel into electrical transmission towers.
26) The steel electrical transmission

towers were assembled on the ground and were moveable.
27) Later, these steel towers were lifted, in one piece, and were placed onto small concrete footings, which footings also were built by BROSS on the actual right of way.
28) The steel electrical transmission towers after being lifted, were connected to the small concrete footings by UNITED STATES owned sub-angles, at each of the four corners of the towers, and were bolted into the footings, in such a manner as to permit the easy removal and relocation of these steel towers at any time.
29) Electrical conductors (wires) which had also previously resold by BROSS to the UNITED STATES, were strung between these steel towers, along their arms. These conductors are also easily removable, and are not permanently affixed to the real estate.
30) The UNITED STATES made additional payments to BROSS, for its services in the transporting of these UNITED STATES owned materials, from these railroad unloading sites, to the actual job site, for BROSS' services in the erection and placement of these steel towers, and for its services in stringing the electrical conductors along the arms of these towers.
31) Sometime after the construction had already been started, the Defendant, SECRETARY OF REVENUE, through the DEPARTMENT OF REVENUE OF THE STATE OF SOUTH DAKOTA, attempted to assess a South Dakota "Use Tax" against BROSS, claiming a "Use Tax" due, pursuant to South Dakota Laws, Chapter 10-46.
32) The Defendant, SECRETARY OF REVENUE



claimed that the "use" in the State of South Dakota by BROSS, of both the materials resold to the UNITED STATES by BROSS and owned by the UNITED STATES, as well as the materials originally owned by the UNITED STATES and furnished by the UNITED STATES to BROSS, were subject to a South Dakota "Use Tax".
33) BROSS, under protest, and without prejudice, paid a "Use Tax" to the DEPARTMENT OF REVENUE OF THE STATE OF SOUTH DAKOTA in the sum of $67,389.93. This total represents Use Tax Returns filed for the months of July 1975 through December 1975.
34) The Defendant, SECRETARY OF REVENUE, later ordered BROSS to appear at a Hearing in South Dakota, wherein the caption of the Notice of the Hearing indicated the Hearing concerned "sales tax" liability, but the body of the Notice indicated "Use Tax" was to be the topic.
35) BROSS protested this Notice and appeared at the Hearing in South Dakota under protest and without prejudice, to be there informed that the Defendant was seeking "Use Tax" liability.
36) The Defendant, SECRETARY OF REVENUE, later ordered BROSS to file additional South Dakota "Use Tax" Returns for the period of January 1, 1976 through June 2, 1977, and to pay South Dakota "Use Tax" due thereunder as well as a penalty for late filing, on all tangible personal property "used" by BROSS in performance of the aforementioned contract with the UNITED STATES.
37) The Defendant, SECRETARY OF REVENUE, is further attempting to require BROSS to audit its books and records, so as to in

turn advise the said Defendant of the amounts he claims to be due and owing to the Defendant Tax Collector, for this illegally imposed "Use Tax".

38) BROSS appealed to the South Dakota State Court to toll the Statute of Limitations concerning enforcement of this tax assessment, but the State Court offers no plain, speedy and efficient remedy.

39) The South Dakota Tax Law taxes the use of tangible personal property, but Section 10-46-1(2) of that law defines the term "use" as follows: "'Use' means and includes: the exercise of right or power over tangible personal property incidental to the ownership of that property..."

40) At all times in question when this property was "used", the "ownership" of all of the subject tangible personal property was in the UNITED STATES, not BROSS.

41) The Constitution of South Dakota, Article V, exempts the property of the UNITED STATES from taxation.

42) The South Dakota Tax Law, Section 10-46-7 also specifically exempts from the "Use Tax":

"...the storage, use or other consumption of tangible personal property" which the State of South Dakota," is prohibited from taxing under the Constitution or laws of the UNITED STATES OF AMERICA, or under the Constitution of South Dakota..."

Said section also specifically exempts tangible personal property..."sold to the UNITED STATES".

43) The materials in question were either owned by the UNITED STATES and furnished to BROSS, or were sold by BROSS to the UNITED STATES, and then used by BROSS. They are exempt from "Use Tax" under Section 10-46-7



of the South Dakota Tax Law.

44) Moreover, Section 10-46-10 of the South Dakota Tax Law, also exempts from the South Dakota "Use Tax":

"...the use in this state of tangible personal property that is used or consumed or stored for use and consumption in...interstate commerce..."

45) The materials in question were used in interstate commerce.

46) The attempted imposition of the said South Dakota "Use Tax" upon BROSS under the facts and circumstances of this case, is unconstitutional and void, and the application of the South Dakota "Use Tax" constitutes a direct burden on interstate commerce, in violation of Article I, Section 8 of the CONSTITUTION OF THE UNITED STATES (the "Commerce Clause"), and the Interstate Commerce Act, 49 U.S.C. Chapter 8.

47) The application of the South Dakota "Use Tax" to BROSS, is further unconstitutional, illegal and void, as it operates as a tax upon tangible personal property sold to the UNITED STATES, in violation of South Dakota Tax Law, Section 10-46-7.

48) The contract between BROSS and the UNITED STATES further clearly envisions BROSS as an instrumentality of the UNITED STATES.

49) In performing its contractual obligations, BROSS was acting as an instrumentality of the UNITED STATES.

50) If a bidder is to be subject to the South Dakota Use Tax, the South Dakota Tax Law, Section 5-18-5.1 requires notification to these bidders in the bidding specifications, of the fair market value of materials to be supplied to a bidder, so that the bidder can calculate its "Use Tax" obliga-

tion in its bid, if there is to be such an obligation.
51) The UNITED STATES failed to comply with South Dakota Tax Law, Section 5-18-5.1, and failed to notify BROSS of the fair market value of the materials the UNITED STATES supplied to BROSS.
52) BROSS failed to include such a tax obligation in its bid.
53) The UNITED STATES, by its failure to advise BROSS and its failure to comply with South Dakota Tax Law, Section 5-18-5.1, under the terms and conditions of this contract and under the facts, has manifested its position that the South Dakota Tax Laws do not apply to this contract and the materials used to complete it.
54) The UNITED STATES in not a party in the State Court action and may not be made to join in said suit.
55) The results of this litigation will be inconsistent if the State Court holds the contractor liable for such a tax, since such a final judgment will be res judicata as to the contractor but not as to the UNITED STATES.
56) Article VI of the CONSTITUTION OF THE UNITED STATES (the "Supremacy Clause") also prohibits the State of South Dakota from assessing a "Use Tax" against the Plaintiff, BROSS, an instrumentality of the UNITED STATES.
57) The application of the South Dakota "Use Tax" to BROSS, under the facts and circumstances of this case, is illegal, unconstitutional, null and void, and is an attempt to deprive BROSS of its property, without due process of law, in violation of the Fourteenth Amendment to THE CONSTITUTION OF THE UNITED STATES.



58) The actions of the Defendant, SECRETARY OF REVENUE, are such as to deprive BROSS of the equal protection of the law as protected by the Fourteenth Amendment to THE CONSTITUTION OF THE UNITED STATES.
59) The issues of this case arise under the CONSTITUTION and laws of the UNITED STATES OF AMERICA, and are inextricably intertwined with questions of state law.
60) This action could have been brought by the UNITED STATES, as a party Plaintiff, and is brought by a Party who could properly be a Co-Plaintiff with the UNITED STATES.
61) This case is a matter in which the UNITED STATES has a special interest insofar as the attempted levy of the State of South Dakota "Use Tax" interferes with a UNITED STATES owned and financially backed construction project, and the incidence of this unlawful State tax ultimately will fall upon the UNITED STATES, in turn, reducing the amount of funds which should be contributed to the "reclamation fund", and the United States Treasury, under 43 U.S.C § 392(a) and 43 U.S.C. § 393.
62) The Plaintiff, BROSS, does not have a plain, speedy, and efficient remedy under the laws of South Dakota.
63) The South Dakota Laws, namely Section 1-26-32, provide that an appeal in the State Court of an order of the Defendant, SECRETARY OF REVENUE, shall not operate as a stay of proceedings for the collection of the tax.
64) A further stay of proceedings rests in the sole discretion of the South Dakota Court and that Court may, as a condition to granting a further stay, require BROSS to furnish substantial financial security or to

post a bond with security, either of which procedures is onerous and is financially prohibitive to BROSS.

65) BROSS will suffer great and irreparable harm and damage to its business, unless further steps in the collection of this unconstitutional and unlawful tax are enjoined.

66) Collection of this unconstitutional and unlawful tax, or the posting of such security will pose such a heavy financial burden on BROSS, that without equitable injunctive relief, BROSS will be in effect denied judicial review of this matter entirely.

67) The financial security or bond, which the State Court may require, would place such an onerous and heavy financial burden on BROSS, as to in effect result in a loss of this case, no matter what the outcome is upon judicial review.

68) The financial security or this bond could not be provided by BROSS, without serious and permanent financial jeopardy to its entire business, which in turn, would in all likelihood, cause loss of employment for BROSS' many hundreds of employees.

WHEREFORE, the Plaintiff, THE THEODORE D. BROSS LINE CONSTRUCTION CORPORATION prays for:

(a) A declaratory judgment, pursuant to 28 U.S.C. § 2201, for the purpose of determining that the Plaintiff is not liable for payment of the South Dakota State "Use Tax".

(b) A temporary and a permanent injunction against any activity of the Defendant, SECRETARY OF REVENUE, related to the collection of the aforesaid illegal "Use Tax", including an injunction against the enforcement of the Defendant's requirement that BROSS audit its books and records in order to determine the amount the "Use Tax" for which the Defendant claims BROSS is liable.

(c) Damages in the sum of $67,389.93, plus interest from the date the Plaintiff, BROSS, was forced to make a partial payment of this illegal tax, made under protest and without prejudice.

(d) Such other and further relief as in equity may pertain.

The Plaintiff further respectfully requests that the Chief Judge of the United States Court of Appeals for the Second Circuit be notified pursuant to 28 U.S.C. § 2284, of the Plaintiff's application for injunctive relief in order that the necessary designation of judges for a three-panel court be made, as required by 28 U.S.C. § 2281.

PLAINTIFF, THE THEODORE D. BROSS LINE CONSTRUCTION CORPORATION

MARK C. YELLIN
Its Attorney
784 Farmington Avenue
West Hartford, CT 06117
(203) 236-6105

I enter my appearance for the Plaintiff in this matter.

MARK C. YELLIN
784 Farmington Avenue
West Hartford, Connecticut

EXHIBIT C

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF CONNECTICUT

| | |
|---|---|
| THE THEODORE D. BROSS LINE CONSTRUCTION COMPANY<br><br>Plaintiff<br><br>v.<br><br>LYLE WENDELL, SECRETARY OF REVENUE OF THE STATE OF SOUTH DAKOTA,<br><br>Defendant | CIVIL ACTION<br>FILE NO. H77-480<br><br>MOTION TO DISMISS |

Defendant Lyle Wendell, as Secretary of Revenue of the State of South Dakota, by Gene R. Woodle, his attorney, moves the court to dismiss the above entitled action for the following reasons:

1. Venue in this action is improper under 28 USC §1391 on the ground that jurisdiction as alleged is not founded only on diversity of citizenship and the defendant does not reside in the district in which the action was brought as is more fully shown from the Complaint filed herein and the Memorandum of Points and Authorities attached hereto.

2. Service of process was insufficient and the court lacks personal jurisdiction over defendant under Federal Rule of Civil Procedure 4d(6) and SDCL 15-6-4(d) (7) on the



ground that the Summons in the above entitled action was not served upon the Governor and the Attorney General of the state of South Dakota as is more fully shown from the U. S. Marshall's Service of Process Receipt and Return filed herein and the Memorandum of Points and Authorities attached hereto.

Dated this 13 day of October, 1977.

GENE R. WOODLE
Assistant Attorney General
Department of Revenue
Capitol Lake Plaza
Pierre, South Dakota
57501

EXHIBIT D

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF CONNECTICUT

| | |
|---|---|
| THE THEODORE D. BROSS LINE CONSTRUCTION COMPANY<br><br>Plaintiff<br><br>v.<br><br>LYLE WENDELL, SECRETARY OF REVENUE OF THE STATE OF SOUTH DAKOTA,<br><br>Defendant | CIVIL ACTION<br>FILE NO. H77-480<br><br>MEMORANDUM OF POINTS AND AUTHORITIES |

This memorandum is respectfully submitted by Defendant, Lyle Wendell, as Secretary of Revenue of the State of South Dakota, in support of Defendant's Motion to Dismiss the above entitled action.

I. Venue in this action is improper under 28 USC §1391.
28 USC §1391(b) provides that "[a] civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law."

On the face of Plaintiff's Complaint it is clear that jurisdiction has been alleged upon grounds other than that of diversity. For instance, paragraph 4 alleges jurisdiction under 28 USC §1331(a) (the Federal Question section) and paragraph 7 alleges



jurisdiction under 28 USC §1343(3) (deprivation of civil rights under color of state law).

In addition there are no special venue statutes which would provide for venue in the United States District Court for the District of Connecticut.

The court in U.S. Exp. Co. v. Allen (C.C Tenn, 1884) 39 F712, rev. on other grounds (S.Ct., 1911) 11 S.Ct. 646, 139 U.S. 591, 35 L.Ed. 273 held that a suit for injunction against state taxes must be brought in the district where the defendant resides when based upon the unconstitutionality of the state statute. Although this opinion was based upon the old general venue statute, 28 USC §112, 1940 ed, the effect of that statute and §1391 are the same. The same rationale was adopted by the court in Alterman Transport Lines Inc. v. Public Service Commission of Tenn. (D.C. Tenn., 1966) 259 F. Supp. 486, affirmed (S.Ct., 1967) 87 S.Ct. 1023, 386 U.S. 262, 18 L.Ed. 2d 39, rehearing denied, 87 S.Ct. 1343, 386 U.S. 1014, 18 L.Ed. 2d 452. Because Plaintiff asks for injunctive relief against enforcement of state taxes, this case falls within the rule of the two cited cases and should be dismissed for improper venue.

The courts have also held that civil right suits, including those brought under 42 U.S. §1983 and declaratory judgment actions must be brought in the district of the defendant or where the cause of action arose. These rules are typified by the case of Maney v. Ratcliff (D.C. Wisc, 1975) 399 F. Supp. for

civil rights cases and Randolph Laboratories v. Specialties Development Corp. (D.C. N.J., 1945) 62 F. Supp. 897 for declaratory judgment actions.

Therefore, this action should be dismissed for improper venue under 28 USC §1391(b) for the following reasons:

1. the Defendant resides in South Dakota;

2. the alleged cause of action arose in South Dakota;

3. jurisdiction as alleged is not founded solely upon diversity;

4. there are no special venue provisions which would override the general venue statute in this case.

II. Service of process was insufficient and the court lacks personal jurisdiction over Defendant under Federal Rule of Civil Procedure 4d(6) and SDCL 15-6-4(d) (7).

Federal Rule 4d(6) provides that service of a summons and complaint upon a state, municipal corporation or other governmental organizations shall be made "...by delivering a copy of the summons and complaint to the chief executive officer thereof or by serving the summons and complaint in the manner prescribed by the law of that state for the service of summons or other like process upon any such defendant." It is apparent from the U.S. Marshall's return of service that the only person served in this case is Joe Dobbs, Deputy Secretary of Revenue. Because the state is the Defendant



in this matter and the chief executive officer of the state, the Governor, was not served; proper service under 4d(6) may only be based upon the provisions of the rule allowing service under state law.

The proper state law in this area is SDCL 15-6-4(d) (7) which reads:

If against the state or any of its institutions, departments, or agencies, by service upon such officer or employee as may be designated by the statute authorizing such action, and upon the attorney general. In all matters involving title to land owned or held in trust by the state or any of its institutions, departments, or agencies, upon the commissioner of school and public lands and the attorney general. In all matters other than those involving title to such lands, if no officer or employee is designated, then upon the Governor and the attorney general. Any of such officers or employees referred to in §15-6-4 may admit service of the summons with the same legal effect as if it had been personally served upon them by an officer or elector.

Because neither the Governor nor the Attorney General were served in this case, service was also improper under state law.

Because neither the Governor nor the Attorney General were served with the Summons and Complaint in this action; process was insufficiently served and the court lacks personal jurisdiction over the Defendant.

It should also be pointed out that Plaintiff

has requested that a three judge court be convened under 28 USC S2281 which was repealed by Pub. L. 94-381, §§1, 2, Aug. 12, 1976, 90 Stat. 1119.

Dated this 13 day of October, 1977.

GENE R. WOODLE
Assistant Attorney General
Department of Revenue
Capitol Lake Plaza
Pierre, South Dakota 57501



EXHIBIT E

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

| | | |
|---|---|---|
| THE THEODORE D. BROSS LINE CONSTRUCTION COMPANY | ) | |
| -VS- | ) | CIVIL ACTION |
| | ) | FILE NO. H-77-480 |
| LYLE WENDELL, SECRETARY OF REVENUE OF THE STATE OF SOUTH DAKOTA | ) | |

RULING ON MOTION TO DISMISS

This case is before the Court on the defendant's motion to dismiss pursuant to the provisions of Fed. R. Civ. P. 12(b). The motion is premised upon a claim that there is both insufficient service of process and improper venue. The Court finds merit in both of these contentions. However, in an effort to secure the most expeditious method of resolving this dispute, the Court orders the transfer of this action to the United States District Court for the District of South Dakota pursuant to 28 U.S.C. §1406(a).

JURISDICTION

The claim in this case involves the alleged unconstitutional enforcement of a South Dakota tax statute. Since the claim arises under the Constitution of the United States and the amount in controversy exceeds $10,000, this Court has subject matter jurisdiction pursuant to 28 U.S.C. §1331.

## FACTS

The plaintiff, The Theodore D. Bross Line Construction Company, (hereinafter called "Bross"), is a Connecticut corporation with its principal place of business in the Town of Bloomfield, Connecticut. In May of 1975 it entered into a $19,400,000 contract with the federal government for the construction of 176.8 miles of electrical transmission lines connecting power substations located in Iowa and South Dakota. As part of the same contract Bross was to construct a 14.4 mile transmission line linking two substations located wholly within the State of South Dakota. The nature of the contract necessitated that Bross purchase specialized construction materials such as conductors, insulators and line hardware. These materials could not be purchased within South Dakota and were purchased outside the state.

South Dakota as part of its revenue laws imposes a "use tax" on any materials purchased outside the state for use within the state. See S.D.C.L. 10-46 et seq. Pursuant to this provision, the state Department of Revenue levied a tax on Bross in the amount of $67,389.93. This tax was based on the cost of construction materials purchased out of state and utilized within South Dakota in the period from July 1975 through December 1975. In addition, Bross was ordered to file a tax return on all subsequent materials brought into the state for use on the project. Bross paid the assessment under protest and unsuccessfully sought relief in the South Dakota courts.



It is Bross' contention that at all times the materials were the property of the federal government and therefore were constitutionally immune from taxation. In this action, Bross seeks both injunctive and declaratory relief as well as damages in the amount of $67,389.93.

## DISCUSSION OF THE LAW

The defendant's claim of insufficient service of process is well founded. Fed. R. Civ. P. 4(d) (6) is determinative of whether there has been valid service in this case. That rule reads:

"The summons and complaint shall be served together. The plaintiff shall furnish the person making the service with such copies as are necessary. Service shall be made as follows:

"...(6) Upon a state or municipal corporation or other governmental organization thereof subject to suit, by delivering a copy of the summons and of the complaint to the chief executive officer thereof or by serving the summons and complaint in the manner prescribed by the law of that state for service of summons or other like process upon any such defendant."

This Rule is specific and requires service on either the Governor or in a manner valid under South Dakota law.

The marshal's return with this Court reveals that the only person served was Joe Dobbs, the Deputy Secretary of Revenue of South Dakota. Since the Governor was not served,

jurisdiction can only be premised upon valid service under South Dakota law. The section of the South Dakota Code dealing with this issue is S.D.C.L. 15-6-4(d) (7), which reads:

"The summons shall be served by delivering a copy thereof. Service in the following manner shall constitute personal service:

"...If against the state or any of its institutions, departments, or agencies, by service upon such officer or employee as may be designated by the statute authorizing such action, and upon the attorney general. In all matters involving title to land owned or held in trust by the state or any of its institutions, departments or agencies, upon the commissioner of schools and public lands and the attorney general. In all matters other than those involving title to such lands, if no officer or employee is designated, then upon the Governor and the attorney general. Any of such officers or employees referred to in 15-6-4 may admit service of the summons with the same legal effect as if it had been personally served upon them by an officer or elector."

The law is explicit in its requirement of service upon the attorney general in any action where personal jurisdiction over the state is sought. Further, the relevant portion of the South Dakota Code for this type of action, S.D. C.L. 10-27 et seq, (Actions for Refund and Invalidation of Taxes), fails to specify the Deputy Secretary of Revenue as an appropriate official upon whom service can be made. Since the requirements of Fed. R. Civ. P.



4(d) (6) have not been met, this Court has no personal jurisdiction over the defendant. Geldermann & Co., Inc. v. Dussault, 384 F. Supp. 566 (N.D. Ill. 1974). The plaintiff's contention that the defendant's actual notice alleviates the necessity of complying with Fed. R. Civ. P. 4(d) (6) is totally without merit. Di Leo v. Shin Shu, 30 F.R.D. 56 (S.D.N.Y. 1961); Tart v. Hudgins, 58 F.R.D. 116 (M.D.N.C. 1972).

The defendant's claim of improper venue is equally well founded. Neither the facts nor the law support the plaintiff's suggested application of 28 U.S.C. §1391(b) to this case. That statute reads:

"A civil action wherein jurisdiction is not founded solely on diversity may be brought only in the judicial district where all defendants resides, or in which the claim arose, except as otherwise provided by law."

The plaintiff contends that the statute is applicable, because the alleged claim arose in this judicial district. The essence of the argument is that since Connecticut is the district in which the contract was formed and administered it is a fortiori the district where the claim arose.

The flaw in this analysis is the plaintiff's perception of what constitutes the claim in this case. As used in 28 U.S.C. §1391(b) "...claim means the aggregate of operative facts giving rise to a right of enforcement in the courts." Ryan v. Glenn, 52 F.R.D. 185, 192 (N.D. Miss., 1971). The operative facts of this case all concern the alleged wrongful collection of use tax by the State

of South Dakota. This tax was assessed and collected in South Dakota on construction materials utilized in that state.

Plaintiff's reliance on a "weight of the contacts" analysis to determine venue is ill-founded. Under such analysis the claim is deemed to arise in the judicial district in which the defendant's contacts have been the most significant. See: Honda Associates Inc. v. Nozowa Trading, Inc., 374 F. Supp. 886 (S.D.N.Y. 1974); Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., 291 F. Supp. 252 (E.D. Pa. 1968). Since the defendant's contacts have been solely within South Dakota this argument is without merit.

As additional justification for its claim of proper venue, the plaintiff relied on 28 U.S.C. §1391(c). That statute provides:

"(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business, or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

The thrust of the plaintiff's contention appears to be that the statute should be interpreted to allow a corporation to sue or be sued in the judicial district of its incorporation. This position is contrary to both the language of the statute and relevant case law. See, Manchester Modes v. Schuman, 426 F.2d 629 (2d Cir. 1970).

The Court recognizes the validity of



defendant's challenges to both personal jurisdiction and venue. However, these arguments are in no way dispositive of the actual issues in dispute. Therefore in order to effectuate the most efficient and orderly resolution of this action on the merits, the Court orders its transfer to the United States District Court for the District of South Dakota. 28 U.S.C. §1406(a). See, Goldlawr, Inc. v. Heiman, 369 U.S. 463 (1962); Thee v. Marvin Class & Associates, 412 F. Supp. 1116 (E.D. N.Y. 1976).

SO ORDERED.

Dated at Hartford, Connecticut, this 19th day of September, 1978.

T. Emmet Clarie
Chief Judge

FOOTNOTES

1/ It appears that 28 U.S.C. § 1341 may act as a jurisdictional bar to this action. That statute reads:

"The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

However in its complaint, the plaintiff asserts that a speedy and efficient remedy is unavailable in the courts of South Dakota. For purposes of this motion, the Court must accept the validity of this averment. A.T.

Bro. v. Perlow, 375 F.2d 393, 397 (2d Cir. 1967); Walker Process Equip. v. Food Mach. & Chem. Corp., 382 U.S. 172 (1965).

2/ The Court notes with interest the Supreme Court's grant of review in Montana v. United States. 46 U.S.L.W. 3719 (May 23, 1978). Though not directly on point, the case will undoubtedly be of guidance in resolving the constitutional issues raised in this action.



EXHIBIT F

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

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| THE THEODORE D. BROSS LINE CONSTRUCTION COMPANY | ) |
| vs. | ) CIVIL ACTION ) FILE NO.H77-480 |
| LYLE WENDELL, SECRETARY OF REVENUE OF THE STATE OF SOUTH DAKOTA | ) MOTION TO AMEND ) ORDER |

The Plaintiff respectfully requests the Court to amend its order of September 19, 1978, transferring this action to the United States District Court for the District of South Dakota, by adding to said order the following:

1. "This Court is of the opinion that the order herein made involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."

2. "The transfer of venue herein ordered is hereby stayed, pending the final resolution of any appeal taken herefrom."

3. "The entry date of the order for transfer of venue shall be the date this amended order is entered."

Dated: September 29, 1978

MARK C. YELLIN
Attorney for Plaintiff
784 Farmington Avenue
West Hartford, CT 06119

I certify that a copy of the foregoing was sent by me to Gene R. Woodle, Asst. Attorney General, Capitol Lake Region, Pierre, South Dakota 57501, and to Peter Gillies, Deputy Attorney General, 30 Trinity Street, Hartford, Conn., U.S. mail postage prepaid, this 29th day of September, 1978.

MARK C. YELLIN

ORDERED: 9/24/78 "Motion to Amend is denied"

So ordered.

Clerk



EXHIBIT G

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF CONNECTICUT

| | | |
|---|---|---|
| THE THEODORE D. BROSS LINE CONSTRUCTION CORPORATION | ) | |
| VS. | ) | CIVIL ACTION FILE NO. H77-480 |
| LYLE WENDELL, SECRETARY OF REVENUE OF THE STATE OF SOUTH DAKOTA | ) | NOTICE OF APPEAL |

NOTICE IS HEREBY GIVEN that THE THEODORE D. BROSS LINE CONSTRUCTION CORPORATION, Plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the Order transferring this action to the United States District Court for the District of South Dakota, entered in this action on the 19th day of September, 1978, and from the denial of Plaintiff's Motion to Amend said Order, entered on September 29, 1978.

Dated: October 3, 1978.

BY:
STEPHEN G. SILVERBERG
Attorney for Plaintiff
above-named
784 Farmington Ave.,
West Hartford, CT
Telephone: 236-6105

BY:
MARK C. YELLIN
Attorney for Plaintiff
above-named

EXHIBIT H

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

| | |
|---|---|
| THE THEODORE D. BROSS LINE CONSTRUCTION CORPORATION, Appellant, vs. LYLE WENDELL, SECRETARY OF REVENUE OF THE STATE OF SOUTH DAKOTA, Appellee. | FILE--CIVIL H-77-480 MOTION FOR AFFIRMATION OF THE JUDGMENT OR TO DISMISS |

The Appellee moves the Court pursuant to Rule 27(b), Rule of the United States Court of Appeals for the Second Circuit, as follows:

I.

To affirm the judgment of the District Court in the above entitled cause on the ground that it is manifest that the question on which the decision of the cause depends is so unsubstantial as not to need further argument.

From the Notice of Appeal filed by Appellee the issue presented for review is: Is the proper venue for this action the United States District Court for the District of Connecticut?

This issue does not raise any substantial



question on appeal because the statutes in this area are clear and not subject to interpretation.

II.

To dismiss this appeal on the grounds that the appeal is not one as of right under Rule 3 of the Rules of Appellate Procedure and the appeal is not within the provisions of Rule 5 of the Rules of Appellate Procedure or 28 U.S.C. § 1292(b) because the district judge refused to amend his order to find that there was a substantial ground for difference of opinion.

This Motion is made and based on the entire record and file of the District Court in the above action. There are attached and by reference made a part of this Motion, a copy of the Ruling on Motion to Dismiss of the District Court, the Appellant's Motion to Amend and Denial of Motion thereon.

DATED this 11th day of December, 1978.

GENE R. WOODLE
Attorney
South Dakota Department
of Revenue
Capitol Lake Plaza
Pierre, South Dakota
57501

EXHIBIT I

UNITED STATES COURT OF APPEAL

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixteenth day of January, one thousand nine hundred and seventy-nine

THE THEODORE D. BROSS LINE CONSTRUCTION CORPORATION,

Plaintiff-Appellant,

v.

LYLE WENDELL, SECRETARY OF REVENUE OF THE STATE OF SOUTH DAKOTA,

Defendant-Appellee.

It is hereby ordered that upon consideration of the motion made herein by counsel for the appelle by notice of motion dated December 11, 1978 to affirm judgment of United States District Court or to dismiss the appeal from the United States District Court for the District of Connecticut for lack of jurisdiction that the motion to dismiss be and it hereby is granted.

A. DANIEL FUSARO
Clerk



It is further ordered that

BY: _____
EDWARD J. GUARDARO,
Deputy Clerk

* * *

HON. LEONARD P. MOORE

HON. WALTER R. MANSFIELD
Circuit Judges

HON. INZER B. WYATT
District Judge

EXHIBIT J

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE THE THEODORE D. BROSS )
)
LINE CONSTRUCTION CORP., )
)
PETITIONER )

PETITION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS

To the Honorable Judges of the United States Court of Appeals for the Second Circuit:

Petitioner, THE THEODORE D. BROSS LINE CONSTRUCTION CORPORATION, respectfully requests leave of this Court to file the Petition for Writ of Mandamus, hereto annexed, and that an order be entered and issued directing the Honorable T. Emmet Clarie, Judge of the United States District Court for the District of Connecticut, to show cause why a Writ of Mandamus should not be issued against him as prayed for in said petition.

MARK C. YELLIN
Attorney for Petitioner
784 Farmington Avenue
West Hartford, CT 06119



EXHIBIT K

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE THE THEODORE D. BROSS )
)
LINE CONSTRUCTION CORPORATION, )
)
PETITIONER )

PETITION FOR WRIT OF MANDAMUS

To the Honorable Judges of the United States Court of Appeals for the Second Circuit:

THE THEODORE D. BROSS LINE CONSTRUCTION CORPORATION, the above-mentioned Petitioner, respectfully shows that:

## I. OPINIONS BELOW

Copies of the orders of the United States District Court for the District of Connecticut and the opinions in connection therewith which may be essential to an understanding of matters set forth in this Petition, are appended hereto and marked as "Exhibit A" and "Exhibit B".

## II. STATEMENT OF FACTS

The Petitioner is a Connecticut corporation whose principal place of business is in Bloomfield, Connecticut. It was the successful bidder on a contract to build a utility line for the United States of America on government-owned land in South Dakota and Iowa. All of Petitioner's

financial, fiscal and planning activities were conducted from Connecticut. When it formulated the bid for this contract, the bid was formulated in Connecticut. All payments to subcontractors, suppliers and taxing authorities were made from Connecticut. All payments to subcontractors, suppliers and taxing authorities were made Connecticut. All materials were ordered from Connecticut and paid for from Connecticut. Any profits the Petitioner makes and any losses it sustains are profits made and losses sustained in Connecticut.

In the course of performing the contract, the Petitioner had occasion to use certain materials owned and supplied to it by the United States of America. The Petitioner also had occasion to order certain materials from outside the State of South Dakota which, on arrival in the State of South Dakota, but prior to passing into the possession of the Petitioner, were sold to the United States of America before use in the State by the Petitioner. Both kinds of material were later used by the Petitioner in its performance of its contract with the United States of America.

Lyle Wendell, Secretary of Revenue of the State of South Dakota attempted to levy a use tax upon the Petitioner based on the value of the material used by the Petitioner, owned by the United States. A portion of this assessment was paid, under protest, by the Petitioner from its home offices in Connecticut. Subsequent to the protested payment, said Lyle Wendell informed the



Petitioner that he wished to assess a further use tax.

The Petitioner brought an action in the District of Connecticut, seeking an injunction against any further enforcement by said Lyle Wendell of the South Dakota use tax statute, and to obtain a refund of the tax paid under protest. Lyle Wendell filed a Motion to Dismiss based on challenges to the personal jurisdiction of the Court and to venue. The District Court, Clarie, J., sustained the challenge to venue and ordered the action transferred to the District of South Dakota. The Court subsequently refused to amend its Order to certify that the disputed issue of law was a matter affording serious grounds for a difference of opinion, under 28 U.S.C. §1292(b).

The Petitioner appealed to this Court from both the Order to Transfer and the denial of the motion to amend the Order to incorporate the §1292(b) certification. Said appeal was dismissed for lack of jurisdiction.

## III. ISSUES PRESENTED

This Petition presents the following issues:

(1) Did the United States District Court for the District of Connecticut in THE THEODORE D. BROSS LINE CONSTRUCTION CORPORATION vs. LYLE WENDELL, SECRETARY OF REVENUE OF THE STATE OF SOUTH DAKOTA, Civil Action File No. H-77-480, err in

ruling that said Court lacked venue because the Petitioner's claim did not arise in the State of Connecticut?

(2) Did the United States District Court for the District of Connecticut in THE THEODORE D. BROSS LINE CONSTRUCTION CORPORATION vs. LYLE WENDELL, SECRETARY OF REVENUE IN THE STATE OF SOUTH DAKOTA, Civil Action File No. H-77-480, err in ordering said action transferred pursuant to 28 U.S.C. §1406(a) to the United States District Court for the District of South Dakota, when said Transferor District Court had proper venue and jurisdiction?

## IV. REASONS FOR ALLOWANCE OF WRIT

This is an appropriate case for this Court to exercise its power to issue all necessary writs under 28 U.S.C §1651, in that the Honorable T. Emmet Clarie misconstrued the law in considering and determining that the cause of action did not arise in Connecticut.

### A. VENUE IN THIS ACTION IN THE JUDICIAL DISTRICT OF CONNECTICUT IS PROPER UNDER 28 USC SECTION 1391.

28 USC Section 1391(b) provides for venue in a Civil Action in the Judicial District ..." in which the claim arose."

Attached hereto as "Exhibit C" is the Affadavit of Mr. Eugene D. Bross, Executive Vice-President of the Petitioner, THE THEODORE D. BROSS LINE CONSTRUCTION CORPORATION, dated February 9, 1978.



This Affadavit clearly points out that the Judicial District of Connecticut is the District wherein "the claim arose."

(1) The bid documents for the construction contract in question, were received, in Connecticut.

(2) The bid was fully prepared and fully estimated by the Petitioner's employees, solely in Connecticut.

(3) The actual construction contract, after receipt of the successful bid, was signed by the Petitioner, in Connecticut.

(4) All materials and all equipment needed for the construction contract were ordered, solely from Connecticut.

(5) All materials that are the subject of the State of South Dakota's Use Tax Claim, were ordered, solely from Connecticut. (With the sole exception of the materials supplied by the United States Government).

(a) All orders for these materials were confirmed by purchase order, issued from Connecticut.

(b) All directions for the initial delivery of these materials were issued, from Connecticut.

(c) All invoices for payment of these materials were received, solely from Connecticut.

(d) All payments for these materials were made, solely from Connecticut.

(6) The project manager on the subject construction job, was hired in Connecticut.

(7) All books and records concerning employees and actual labor performed on the construction job, were maintained in Connecticut.

(8) All labor on the subject construction job was paid, solely from Connecticut.

(9) All materials and equipment needed and utilized on the subject job, were sent from Connecticut or ordered solely from Connecticut.

(10) All orders for the general supervision of the subject construction job were issued from Connecticut.

(11) All corporate books, records, and reports concerning the subject construction job were kept solely in Connecticut, and remain in Connecticut.

(12) All of the Petitioner's employees and executives who have knowledge of the subject matter of this litigation, live in Connecticut and work in Connecticut. The Petitioner has only two full-time employees in South Dakota.

(13) All of Petitioner's witnesses as to the facts of this case, and all books, records, reports, invoices, cancelled checks and other documents, are located



solely in Connecticut.

(14) The payment of $67,389.93 made by the Petitioner to LYLE WENDELL, Secretary of Revenue of the State of South Dakota, under protest on account of the South Dakota Use Tax, was made from Connecticut.

(15) All materials and supplies for which the State of South Dakota is claiming Use Tax, were ordered and purchased from, invoiced to and paid solely from Connecticut.

On the facts, it is clear that the claim which is the subject matter of this litigation, arose in the Judicial District of Connecticut.

The Situs of the taxing injury or the potential taxing injury does not, however, in and of itself determine the proper venue of this case. In Philadelphia Housing Authority v. American Radiator and Standard Sanitary Corporation, 291 F. Supp. 252, 260, (1968), the U.S. District Court held that to adopt a mechanical test" of "place of injury" to determine "where the claim arose" may be valid in a tort suit involving personal injuries or wrongful death, but would be overly "simplistic" in other cases.

The case of Weil v. New York State Department of Transportation, 400 F. Supp. 1364, (1975) concerned an action brought by a state civil servant to contest a layoff. The U.S. District Court, using the "weight of the contacts" test, held that venue should be placed in the district in

which the decision to lay-off the plaintiff was made, rather than in the district in which the decision was implemented.

The Petitioner's action presents an analogous situation. The facts clearly show that the weight of the contacts in the preparation, execution and performance of the BROSS-UNITED STATES contract have been almost exclusively in the District of Connecticut. All of the materials sought to be taxed by the Defendant were ordered, invoiced and paid for in Connecticut. Directions for shipment in interstate commerce were issued from Connecticut. Therefore, within the meaning of 28 U.S.C. 1391(b), venue is properly placed in the District of Connecticut where the contract and the claim arose.

B. VENUE IS PROPERLY PLACED IN THE DISTRICT OF CONNECTICUT BASED ON CONSIDERATION OF INCONVENIENCE AND DISADVANTAGE TO A PARTY.

In the event that this Court should find that the balance of the weight of the contacts in this action is shared between the District of Connecticut and an alternative district, venue is properly placed in the District of Connecticut nonetheless.

In Idaho Potato Commission v. Washington Potato Commission, 410 F. Supp. 171 (1975), the defendant had approved an advertising plan in the State of Washington. The plan, which was the basis for an alleged trademark infringement, was implemented in Idaho. The court held that the "weight of



the contacts" was shared between Washington and Idaho. Venue could be properly placed in either district. Selection of either forum would be equally disadvantageous and inconvenient to the parties involved. The court allowed the action to be brought in the forum chosen by the Plaintiff.

In the instant action, the Petitioner BROSS would be greatly inconvenienced and would suffer severe hardship if its action were to be transferred out of the District of Connecticut (or dismissed entirely). BROSS' witnesses, key personnel, and business books and records are all located within the District of Connecticut. If this Court were to find that the balance of "the weight of the contacts" is shared between the Connecticut district and an alternative forum, Idaho Potato Commission still requires that the Plaintiff's choice of forum should be respected, and that venue be placed in the District of Connecticut.

C. VENUE IS PROPERLY PLACED IN THE DISTRICT OF CONNECTICUT WHICH IS THE RESIDENCE OF THE CORPORATE PLAINTIFF.

28 U.S.C. 1391(c) provides an additional justification for the placement of venue in the Judicial District of Connecticut. That Statute provides:

"(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business, or is doing business, and such judicial district

shall be regarded as the residence of such corporation for venue purposes."

A number of Courts have held that Section 1391(c) was intended to apply to corporate plaintiffs as well as corporate defendants.

This view is in keeping with Congressional intent to liberalize the venue status.

See 1 Moore's Fed Practice ¶70.142 (5-3) at 1500-1503:

"Toilet Good Association, Inc. v. Celebrezze, 235 F. Supp. 648 (S.D.N.Y. 1964); Wear-Ever Aluminum, Inc. v. Sipos, 184 F. Supp. 364 (S.D.N.Y. 1960); Southern Paperboard Corporation v. United States, 127 F. Supp. 649 (S.D.N.Y. 1955); Freiday v. Cowdin, 83 F. Supp. 516 (S.D.N.Y. 1949), appeal dismissed by consent, 177 F. 2d 1020 (2d Cir. 1949); Consolidated Sun Ray, Inc. v. Steel Insurance Co., 190 F. Supp. 171 (E.D. Pa. 1961); Travelers Insurance Co. v. Williams, 164 F. Supp. 566 (W.D.N.C. 1958) aff'd 265 F.2d 531 (4th Cir. 1959); Standard Insurance Co. v. Isbell, 143 F. Supp. 910 (E.D. Tex. 1956); Eastern Motor Express, Inc. v. Espenshade, 138 F. Supp. 426 (E.D. Pa. 1956); Hadden v. Barrow, Wade Guthrie & Co., 105 F. Supp. 530 (N.D. Ohio 1952)."

Furthermore, unless Section 1391(c) is interpreted to apply to both corporate plaintiffs and defendants, the second clause is redundant and would, therefore, be read so as to define the residences of corporate plaintiffs differently from



the residences of corporate defendants. It is an accepted rule of statutory construction that statutes must be read so as to be logically and internally consistent. So read, §1391(c) provides BROSS as a corporate plaintiff and resident of the District of Connecticut, an additional basis to properly establish venue for this action in the District of Connecticut.

Equity fairness and good sense, require that venue in this action be and remain in Connecticut.

The cause of action arose in Connecticut.

A second reason for this Court to exercise its power to issue all necessary writs under 28 U.S.C. §1651 is that the Honorable T. Emmet Clarie misconstrued the intent and meaning of 28 U.S.C. §1406(a) and abused his discretion in ordering the transfer of the cause of action pursuant to said statute in that said statute requires that the transferor court lack venue, but in fact said transferor court had proper venue.

D. A WRIT OF MANDUMUS IS THE APPROPRIATE PROCEDURE TO REVIEW AN INTERLOCUTORY ORDER DIRECTING A TRANSFER.

This Court has stated that mandamus would lie to review an interlocutory order granting or denying a transfer. In Ford Motor Co. v. Ryan, 182 F.2d 329 (CA 2d, 1950), cert. den. 340 U.S.C. §1404(a), Frank, Circuit Judge,held that mandamus would lie to review an order refusing to direct a transfer. The rational for

granting the writ of mandamus was stated as follows:

"... Judge Hand and I think this is the kind of interlocutory order with which this court can properly deal by way of such a writ, since should petitioners--the defendants--finally lose on the merits below, any error in the interlocutory order would probably be incorrectible on appeal, for petitioners could hardly show that a different result would have been reached had the suit been transferred. Nor, should petitioners win on the merits below, could they collect as costs the additional expenses to them, if any, due to the court's failure to order the transfer. We recognize that the dividing line is by no means entirely clear between the power of this court and its lack of power to issue the writ. But we think this is a sufficiently 'extraordinary cause' to empower us to do so, if the district judge erred."

Ford Motor Company v. Ryan, 182 F.2d 329, at 330.

The above rationale for granting a writ of mandamus for a transfer pursuant to 28 U.S.C. §1404(a) in equally applicable to the instant matter, involving a transfer pursuant to 28 U.S.C. §1406(a). "...(A)ny error in the interlocutory order would probably be incorrectable on appeal,..." whether the transfer was ordered pursuant to 28 U.S.C. §1404(a) or §1406(a).

V. RELIEF SOUTH

WHEREFORE, Petitioner prays:



(1) That a writ of mandamus issue from this Court directing the Honorable T. Emmet Clarie to vacate and set aside his order entered September 19, 1978, granting the said motion for transfer of the action described therein;

(2) That pending argument upon this petition and disposition thereof by this Court, the Honorable T. Emmet Clarie be ordered to stay transfer of the aforesaid action from the District of Connecticut to the United States District Court for the District of South Dakota;

(3) That Petitioner have such additional relief and process as may be appropriate in the premises.

MARK C. YELLIN
Attorney for Petitioner
784 Farmington Avenue
West Hartford, CT 06119

I hereby certify service by mail on February 1, 1979 to the Honorable T. Emmet Clarie, the Governor of the State of South Dakota, the Attorney General of the State of South Dakota and Lyle Wendell, Secretary of Revenue of the State of South Dakota.

MARK C. YELLIN
Commissioner of the
Superior Court

EXHIBIT L

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

| | | |
|---|---|---|
| In Re: | The Theodore D. Bross Line Construction Corp. | 79-3013 |

A petition for a writ of mandamus having been filed, together with a motion for a stay

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

Henry J. Friendly

J. Joseph Smith

Walter R. Mansfield
Circuit Judges.

Dated: March 8, 1979



EXHIBIT M

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF CONNECTICUT

| | |
|---|---|
| THE THEODORE D. BROSS LINE CONSTRUCTION CORPORATION<br><br>PLAINTIFF | Civil Action File No. H77-480 |
| VS.<br><br>LYLE WENDELL, SECRETARY OF REVENUE OF THE STATE OF SOUTH DAKOTA<br><br>DEFENDANT | |

State of Connecticut : ss West Hartford
:
County of Hartford : February 9, 1978

AFFIDAVIT OF EUGENE D. BROSS

The undersigned, Eugene D. Bross, being duly sworn, deposes and says:

(1) I am more than 18 years old and know the meaning of an oath.

(2) I am Executive Vice President of The Theodore D. Bross Line Construction Corporation, a Connecticut corporation whose principal place of business is in Bloomfield, Connecticut.

(3) The following facts are true:

1. The bid documents for the construction contract in question, were received, in Connecticut.

2. The bid was fully prepared and fully estimated by the Plaintiff's employees, solely in Connecticut.

3. The actual construction contract, after receipt of the successful bid, was signed by the Plaintiff, in Connecticut.

4. All materials and all equipment needed for the construction contract were ordered, solely from Connecticut.

5. All materials that are the subject of the State of South Dakota's Use Tax Claim, were ordered, solely from Connecticut. (With the sole exception of the materials supplied by the United States Government).

   (a) All orders for these materials were confirmed by purchase order, issued from Connecticut.

   (b) All directions for the initial delivery of these materials were issued, from Connecticut.

   (c) All invoices for payment of these materials were received, solely in Connecticut.

   (d) All payments for these materials were made, solely from Connecticut.

6. The project manager on the subject con-



struction job, was hired in Connecticut.

7. All books and records concerning employees and actual labor performed on the construction job were maintained in Connecticut.

8. All labor on the subject construction job was paid, solely from Connecticut.

9. All materials and equipment needed and utilized on the subject job, were sent from Connecticut or ordered solely from Connecticut.

10. All orders for the general supervision of the subject construction job were issued from Connecticut.

11. All corporate books, records and reports concerning the subject construction job were kept solely in Connecticut , and remain in Connecticut.

12. All of Plaintiff's employees and executives who have knowledge of the subject matter of this litigation, live in Connecticut and work in Connecticut. The Plaintiff has only two full-time employees in South Dakota.

13. All of the Plaintiff's witnesses as to the facts of this case, and all books, records, reports, invoices, cancelled checks and other documents, are located solely in Connecticut.

14. The payment of $67,389.93 made by the Plaintiff to the Defendant, on account of

the South Dakota Use Tax (in Paragraph 33 of the Complaint), was made from Connecticut.

15. All materials and supplies for which the State of South Dakota is claiming Use Tax, were ordered and purchased from, invoiced to and paid solely from Connecticut.

Eugene D. Bross

Subscribed and sworn to before me this 9th day of February 1978.

Mark C. Yellin
Commissioner of Superior Court